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Preliminary report on the expulsion of aliens

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I. Introduction

1. The history of mankind has been characterized by mistrust of strangers and the temptation to withdraw from contact with them. There is no need to present a complete picture of this phenomenon, which affects all regions of the world. For example, the Greek city States sought to isolate themselves in an autarkic unit, believing that there was nothing beyond their walls but small tribes of savage barbarians.[1] In Sparta, aliens were banned from the city and accused of disrupting the public order established by law, *eunomia*; already, even in these ancient times, public order was invoked as a justification. From Sparta to Rome, the same attitude prevailed. Aliens were treated as enemies, as seen in the Latin adage: *hostis*, *hospes* (stranger, enemy).[2] Beyond the fortifications marking the boundaries of first the city and then the Empire — such as Hadrian's wall, dividing England from Scotland, the impressive ruins of which still exist — was the world of aliens denied the status of Romans, where only a banished Roman citizen would venture.

2. Today, the status of aliens is very different from what it was under Roman law; most modern, liberal legislation grants them full civil equality with nationals. During the first half of the twentieth century, there was a wave of openness to aliens in Latin America, to the point that then-Attorney-General Montt of Chile declared that, throughout Latin America, aliens had every advantage except access to high-level posts in Congress.[3] Until recently, a similar policy was in force in some African countries. During the first two decades following their independence in the 1960s, it was not unusual for citizens of one African country to occupy high-level posts in the governments of other African States while retaining their nationalities of origin or for large groups of Africans from one country to settle and live peacefully in another African country without following the entry or sojourn procedures or acquiring the nationality of the host State. Such openness also existed among the old European nations, where it has gradually become more widespread as a result of the creation of the European Community.

3. Despite this liberal trend in contemporary legislation, however, the expulsion of aliens remains a common practice on every continent. On the grounds that the right to expel is an inalienable right of the State, States do not hesitate to use it as a shield against aliens whom they view either as a threat to national security or as a potential threat to public order in the host country. For example, this right has been widely invoked against the Chinese, who were the most commonly expelled, in the late nineteenth century, especially in America; at that time China had no place in the family of so-called "civilized" nations and thus could not appeal to the international community, especially as China itself repeatedly invoked the right to expel aliens.[4] Moreover, the expulsion of aliens in time of war seemed perfectly normal at a time when war between States, even in cases not involving self-defence, was not

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[1] See Jean Touchard et al., *Histoire des idées politiques* (Paris, Presses Universitaires de France (Thémis), 1959), vol. 1: "Des origines au XVIIIe siècle", pp. 9 and 10.

[2] See Baroness Elles (Special Rapporteur of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities), *Study of International Provisions Protecting the Human Rights of Non-Citizens* (United Nations Publication, Sales No. E.80.XIV.2).

[3] See J. Irizarry y Puente, "Exclusion and expulsion of aliens in Latin America", *The American Journal of International Law* 36 (1942), pp. 252 and 253.

[4] See A. H. Marsh, "Colonial expulsion of aliens", *American Law Review* 33 (1899), pp. 90 and 91.

prohibited by international law and when a declaration of war was automatically considered to make the people of the belligerent States each other's enemies. One late-nineteenth-century author wrote: "Nothing could be clearer than the right of the British executive in time of war to exclude the subjects of the unfriendly power."[5]

4. The spread of freedom and democracy and the development of humanitarian and human rights law have shown that a government can go to war even against the will of the majority of its people and have led jurists, States and public opinion to distinguish between combatants and non-combatants and between the acts of States and those of individuals. Nevertheless, the expulsion of aliens has become far more common in peacetime than in time of war. Thus, it is no longer a case of aliens from an enemy country versus aliens from a friendly country, nor are the friendly relations between two States necessarily at stake when aliens are expelled; the cause is more likely to be the expelling State's desire to solve a domestic problem. Whether aliens are used as scapegoats[6] or are the victims of their own misdeeds, the desire to preserve public order is the primary motive for their expulsion.[7] The frequent discrepancies between State practice and international law do pose problems in this area.[8]

5. The topic of the expulsion of aliens is of particular interest today insofar as it reveals the contradiction between technical and economic globalization, which promotes greater trade flows between nations, and the raising of barriers based on sovereignty which hinder or block the movement of persons by creating selection procedures for distinguishing between those who have the right to enter and reside in the territory of a State or group of States, and those who lack that right. With the development and rapidity of modern means of transport, migratory flows from one country to another and from one part of the world to another have literally exploded, intensified by development inequalities between nations which lead more and more marginalized people from poor countries to seek entry into rich countries in the hope of a better future.[9] But, paradoxically, national borders are becoming less permeable and the manner in which aliens are received varies according to all manner of considerations, including the applicants' economic potential, their scientific expertise and even their religious beliefs. The unprecedented scope of international terrorism and the ongoing threat that it represents only make matters worse; they have aggravated national tensions that had long been based primarily on social and economic egotism and xenophobia. The key problem in this area is how

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[5] Ibid., p. 91.

[6] In 2004, for example, several hundred Cameroonians were expelled from Equatorial Guinea because the regime in power in that country was at risk of destabilization by foreign mercenaries (see the *Cameroon Tribune*, 15 March 2004).

[7] One of the most recent cases is the expulsion on 19 March 2005 of three clergymen of the Universal Church of the Kingdom of God, a religious group founded in Brazil, because the group was burning copies of the Bible in public (source: Radio France Internationale, 19 March 2005).

[8] See Charles de Boeck, "L'expulsion et les difficultés internationales qu'en soulève la pratique", Recueil des Cours de l'Académie de la Haye, vol. 18 (1927-111) (Paris, 1928), pp. 443-650.

[9] To offer an example, the aforementioned study of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities noted, more than 20 years ago, that over 10 million people had emigrated from Europe and another 10 million had immigrated to the European Community since 1945; over 7 million people had been transferred from India to Pakistan since 1947; and about 5 million migrants were working in Africa each year (op cit., p. 1, para. 15).

to reconcile the right to expel, which seems inherent in State sovereignty, with the demands of international law and, in particular, the fundamental rules of human rights law.

6. This preliminary report seeks to provide an overview of the topic by demonstrating the legal issues that it raises and the problems associated with their consideration. The Special Rapporteur was of the view that the advantage, and the very essence, of a preliminary report are to present the topic to be studied in order to explain how he proposes to proceed and to seek guidance from the Commission in that regard. A preliminary report formulates issues and suggests approaches rather than offering final solutions embodied in positive law or, where applicable, suggested by the progressive development of international law. It is in this spirit that the Special Rapporteur proposes, in this report, first to set forth the issues raised by the very idea of the "expulsion of aliens" (sect. II); then to provide an overview of the right to expel in international law (sect. III), the grounds for expulsion invoked in practice (sect. IV) and the rights at stake during expulsion (sect. V); and, lastly, to examine the methodological problems associated with consideration of the topic (sect. VI). The manner in which the Special Rapporteur proposes to conduct the study of this topic will then be described through a workplan which is placed before the Commission for discussion, provided in annex I to the preliminary report; annex II contains a bibliography which in no way claims to be exhaustive; its purpose is simply to offer a source of supplementary information which may help to enrich the Special Rapporteur's future work.

II. The concept of the expulsion of aliens

7. The topic, "the expulsion of aliens", is based on two ideas: that of "expulsion" and that of "alien", which must be defined before an attempt is made to identify the rules of international law relating thereto. Because the concept of expulsion can be understood only in relation to that of alien, the latter will be discussed first. "Alien" means an individual who does not hold the nationality of the host country or the country of residence but who is bound by a link of nationality to the State from which he or she comes — the State of origin — or who holds no nationality at all and is thus in a situation of statelessness.[10]

8. Viewed as a fact, expulsion may be understood simply as a forced border crossing or exit from the territory of a State by an individual who is compelled to do so. But this description does not provide an adequate legal determination of the concept of expulsion; its legal definition requires particularly close study because it seems to be interwoven with other similar concepts from which it cannot easily be separated. It appeared to the Special Rapporteur that a definition of the concept of expulsion under international law could be proposed only after comparing it with other concepts such as the displacement of populations, exodus, deportation, extradition, refoulement, non-admission, exclusion from a territory, "extrajudicial transfer", "extraordinary transfer", removal from a territory and escort to the border.

[10] See, inter alia, Bruno Nascimbene and Alessia di Pascale, "Rapport de synthèse et conclusions", in *L'éloignement et la détention des étrangers dans les Etats membres de l'Union européenne*, ed. B. Nascimbene (Milan, Giuffrè, 2001), p. 533 and Pierre Marie Dupuy, *Droit international public*, 7th ed. (Paris, Dalloz, 2004), p. 129.

9. Most of these concepts share common traits with that of expulsion, but they differ from it in several ways. For example, the same legal concept cannot be applied to both the *MV Tampa* case, which involved a ship flying the Norwegian flag which the Australian and Indonesian Governments would not allow to dock because they did not want to accept the hundreds of Afghan and Iraqi asylum-seekers on board,[11] and the March 2004 expulsion of hundreds of Africans of various nationalities from an African country of which some of them were longtime residents.[12]

10. We can easily agree that persons displaced within their own country do not fall within the scope of this topic. Non-admission or refusal of admission — a situation in which a person who has not yet entered a State's territory is prevented from doing so — lies on the margins of the topic: it will have to be decided whether it should be included or not. It will also have to be determined whether a person who enters a State's territory clandestinely and is "removed" from it should be deemed to have been expelled or refused entry and whether the topic should include cases of expulsion by a victorious Government in the context of a conflict between two peoples, each seeking exclusive control of the same territory — for example, the hundreds of thousands of Palestinians who were forced to leave or were expelled from their homes and land when the State of Israel was established in 1948, and again following the occupation of a portion of their territory after the Six Day War in 1967.

11. In this preliminary report, the Special Rapporteur does not intend to embark on a semantic comparison of each of the aforementioned concepts with the central concept of expulsion or to propose responses to the various concerns expressed above. One of the objectives of the first report will be to clarify these concepts, taking the Commission's guidance into account in determining the scope of the concept of the expulsion of aliens for the purpose of developing a set of draft articles. In this report, it will suffice to mention the plethora of terms used in this field, both in legal theory[13] and in the legislation of certain countries,[14] and to propose an entirely provisional definition of the concept of expulsion with a view to delimiting the scope of the preliminary consideration and discussion of the topic.

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[11] On the *MV Tampa* case, see Amnesty International's annual report on the Pacific region of 25 August 2002, entitled Australia-Pacific: Offending human dignity — the "Pacific Solution" (http://web.amnesty.org/library/index/engasa120092002).

[12] See the expulsions from Equatorial Guinea mentioned above.

[13] For example, scholars speak of removal from a territory (see Rudolph d'Haëm, *La reconduite à la frontière des étrangers en situation irrégulière* (Paris, Presses Universitaires de France (Que sais-je), 1997), p. 3) and of deportation (see "Governing Rule 12: Expulsion or Deportation of Aliens"), in *Studies in Transnational Legal Policy* 23, 1992, pp. 12 et seq.

[14] See, for example, the French Act of 9 September 1986 on conditions governing the entry and stay of aliens in France, in which the terms "expulsion", "escort to the border" and "inadmissibility" are used (Act No. 86-1025 of 9 September 1986, *Juriclasseur Périodique* (J.C.P.), 1986 III, 59212, and *Journal Officiel de la République française* (J.O.R.F.), 12 September 1986).

12. Following the reasoning of domestic law, "expulsion" can refer to an administrative policy measure enjoining an alien to leave a territory.[15] Under French law, for example, the term "expulsion" is used in reference to aliens whose presence in French territory, even if legal, constitutes a "serious threat to public order".[16] This strict definition of the concept excludes several other measures for the removal of aliens which, in the Special Rapporteur's view, should fall within the scope of the concept within the framework of this topic. The term "removal" seems, at first glance, preferable because it is more comprehensive, but although it is used by some theorists,[17] it has the disadvantage of not being a consecrated legal term.

13. The Special Rapporteur believes that for the purposes of this topic, the term "expulsion" should be retained but should be interpreted broadly so as to include all measures for removing aliens from the territory of the expelling State. From the point of view of international law, it should be explained that such a measure must be a unilateral legal act — that of a State — and that it is a compulsory measure targeting an individual or group of individuals. Thus, "expulsion" might be provisionally defined as a legal act in which a State compels an individual or group of individuals who are nationals of another State to leave its territory. The study will show whether the expelled person's physical crossing of the expelling State's border corresponds to the concept of expulsion, or whether it is a consequence thereof, and whether a distinction should be made between the legal act of expulsion and the expelled person's physical act of crossing the border or leaving the territory of the State in question.

III. The right to expel

14. The monitoring by a State of its borders is intended not only to warn it of any invasion by foreign armed forces, but also to protect it from infiltration by aliens seeking peacefully to enter the territory to take advantage of living standards within it.[18] International law therefore recognizes the discretionary power of each State to grant or refuse entry to its territory. Equally, international law recognizes the right of the State itself to set the conditions for the entry and residence of aliens in its territory.[19] In the words of a late nineteenth century author "Every country has a right to judge of the terms upon which it will admit foreigners within its borders ... The exercise of that right is one of which no nation has any right to complain".[20]

[15] *Dictionnaire de droit international public*, ed. Jean Salmon (Brussels, Bruylant, 2001), p. 488.

[16] See the report of François Julien-Laferrière and Sophie de Sèze in Nascimbene (ed.), op. cit., pp. 183 et seq.

[17] Ibid.; see also the title of the book.

[18] See Roman Rewald, "Judicial control of administrative discretion in the expulsion and extradition of aliens", *American Journal of Comparative Law* (*Supp.*, 1986), p. 41.

[19] See V. J. Irizarry y Puente, "Exclusion and expulsion of aliens in Latin America", op. cit., p. 254.

[20] A. H. Marsh, "Colonial expulsion of aliens", op. cit., p. 90.

15. Logically, the obverse of the right to regulate the admission or non-admission of aliens is the right to expel them. Every State fully enjoys that right, which is inherent in its sovereignty. It is a principle of customary international law, which is rarely contested.[21] As Shigeru Oda once said:

> "The right of a State to expel, at will, aliens, whose presence is regarded as undesirable, is, like the right to refuse admission of aliens, considered as an attribute of the sovereignty of the State".[22]

16. National laws, international jurisprudence and doctrine are in agreement that this right is not an absolute right of the State.[23] The State resorting to expulsion is bound to invoke the grounds used to justify it.[24] Although every State in fact has the right freely to determine the grounds for expelling an alien according to its own criteria, "the right of expulsion still must not be abused".[25] The State's right to expel aliens therefore falls within the realm of international law.

IV. Grounds for expulsion

17. There are always grounds for the expulsion of an alien by a State, whether they are avowed or unavowed. It is agreed that some grounds for expulsion are not contrary to international law. This is generally the case with breaches of "law and order", "public safety" or "national security". In fact, any notion as vague as that of law and order sometimes gives rise to many different, often very broad, interpretations including acts that could not be considered the basis for lawful expulsion.

18. Grounds for expulsion may vary from one country to another. In the United States of America, for example (the Immigration and Nationality Act), in force in 1965 excluded from entry into American territory aliens having a psychopathic personality or suffering from epilepsy or mental retardation. In two famous cases relating to this Act, *Boutilier* v. *INS*[26] and *In re Longstaff*,[27] the Supreme Court decided to refuse admission to and, furthermore, to order the expulsion of, homosexual aliens on the ground of sexual deviation.

19. A study of a variety of national laws shows an even wider range of grounds for expulsion. For example, expulsion may be motivated by the fact that, among other things, the alien is a threat or a danger to public peace; jeopardizes relations between the country concerned and other States; seeks to foment change in the political order through violent means; espouses doctrines that are either subversive

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[21] In this connection, it is worth noting the marginal opinion of M. Tchernoff, "Protection des nationaux resident à l'étranger", *Revue de droit internationale*, vol. XX, p. 45, which states: "Few persons nowadays maintain that the right to expel aliens is a normal attribute of a State exercising its civilizing function".

[22] In M. Sørensen (ed.), *Manual of Public International Law*, 1968, p. 482.

[23] See V. Bluntschli, *Droit internationale codifié*, article 383; *Oppenheim's International Law*, 9th edition, vol. 1, p. 940.

[24] *Boffolo* case, *R.S.A.*, vol. X, p. 533; see also *Paquet*, ibid., vol. IX.

[25] S. Oda, op. cit., p. 482.

[26] 387 U.S. 118 (1967) and the critical note "The Immigration and Nationality Act and the exclusion of homosexuals: Boutilier vs. INS Revisited", *Cardozo Law Review*, 1981, p. 359 et seq.

[27] 716 F 2d 1439 (5th Cir. 1983).

or contrary to the established order; is unemployed, without a fixed abode or without a livelihood; is a criminal or is being prosecuted; or is suffering from an infectious or serious illness, is mentally deficient, a beggar, a prostitute, an adventurer or an illicit trafficker. Such grounds are found in the law of Latin American countries for the period between 1907 and 1925.[28] There is also the expulsion of Roma from several European and Latin American countries; the expulsion of aliens from some countries because of their ideological convictions, in particular during the cold war;[29] or the expulsion of various persons, such as homosexuals, because of their sexual behaviour.[30]

20. The international context has evolved and, with it, so have the rules of international law. To a large extent, the rules relating to the protection of fundamental human rights no longer fall within the purview of States and this affects the law applicable to the expulsion of aliens. The question to be answered therefore is which of the many grounds for expelling aliens are admissible under international law, or *a contrario*, which are prohibited. Yet how can this question be answered effectively, when what is admissible or tolerated in one State or region of the world may not necessarily be so elsewhere? The lawful or unlawful nature of grounds for expulsion follows the evolution of international legal standards concerning the protection of human rights. We must therefore be able to determine the relevant universal standards.

V. Rights related to expulsion

21. The exercise of the right to expel brings into play the rights of the aliens being expelled and those of their State of origin. The rights of expellees vary according to whether a case concerns the expulsion of an individual, collective expulsion or the expulsion of migrant workers.

22. Expulsion of an individual, which is the most commonly practised form, usually involves the rights of an individual. Those rights may derive either from the expelling State's national legislation or from international human rights law. In that regard, the lawfulness of the expulsion depends on two factors: conformity with the expulsion procedures in force in the expelling State and respect for fundamental human rights.

23. With regard to the expulsion procedure, a logical rule holds that if a State has the right to regulate the conditions for immigration into its territory without thereby infringing any rule of international law, it also is obliged to act in conformity with

[28] Such grounds arise in the law of Brazil (1907), Panama (1914), Chile (1919), Columbia (1920) and the Bolivarian Republic of Venezuela (1925); see Irizarry y Puente, op. cit., p. 256, notes 22-34.

[29] This refers, in particular, to the expulsion of communists from the United States of America during the McCarthy era.

[30] See Samuel M. Silvers, "The exclusion and expulsion of homosexual aliens", *Columbia Human Rights Law Review*, 1983-1984, p. 295 et seq.

the rules which it has adopted or to which it has agreed[31] concerning the expulsion of persons whom it deems that it cannot receive or retain in its territory. In such cases, the State is bound by one of the following adages: *pacta sunt servanda and tu patere legem quam ipse fecisti*, or both. This requirement concerning respect for procedures provided for by law may therefore be considered an obligation under general international law and not strictly a treaty obligation or an obligation under domestic law alone. In the absence of a treaty, it might be reasonable to claim that the requirement has a basis in customary law, or to consider it a general legal principle. With regard to personal rights to be respected in cases of expulsion, international law is applicable through both customary and treaty law. The obligations of the territorial State under customary international law apply to all aliens regardless of nationality. They are grouped around the rather imprecise notion of a "minimum standard", which is based on the idea that nowadays international law affords aliens a minimum of guarantees, even though it is difficult to specify what they are.[32] What is known is that the requirement concerning respect for the dignity of the alien being expelled is one of the standards guaranteed by international law with regard to natural persons. The assets held by the expelled alien in the territory of the expelling State, are protected by the relevant rules of international law. However, protection of the alien who has been or is being expelled, as well as his assets, may be enhanced by treaty norms: those contained in international human rights agreements to which the expelling State is a party and those provided for by special agreements relating to the protection of assets and investments drawn up between the expelling State and the alien's State of origin where such special agreements exist.

24. With regard to collective expulsion, the principle deriving from international law prohibits it,[33] although it is still practised by some States.[34] The question is whether this prohibition is absolute. Despite the brevity of the provisions addressing it, the matter is open to doubt. It might be difficult, for example, to raise this principle to object where a group of nationals of one State jeopardized the safety of, or posed a genuine threat to, a second State in which they were residing and which

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[31] See article 13 of the International Covenant on Civil and Political Rights, adopted by the United Nations General Assembly on 16 December 1966 (resolution 2200 A (XXI); see also article 31 of the Convention relating to the Status of Stateless Persons, of 1954; article 22 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families of 1990; and at the regional level: article 22 (6) of the American Convention on Human Rights, of 1969; the African Charter of Human and People's Rights, of 1981; and article 1 of Protocol No. 7, of 1984, to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

[32] See P. M. Dupuy, op. cit., p. 131.

[33] See article 4 of Protocol No. 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (freedom of movement and of choice of residence; prohibition of exile, of collective expulsion of aliens and of imprisonment for a civil debt) which was signed in Strasbourg, France, on 16 September 1963 and entered into force on 2 May 1968 (text published in *International Legal Materials*, 1967, p. 27).

[34] See, for example, the collective expulsion of the Indo-Pakistanis from Uganda under Idi Amin during the 1970s (on this topic, see Michael Twaddle (ed.), *Expulsion of a minority: essays on Ugandan Asians* (London, Athlone Press, 1975), p. 240); the expulsion of groups of Africans of different nationalities (in particular Beninese and Ghanaians) from Nigeria in the 1980s (see A. A. Afolayan, "Immigration and expulsion of ECOWAS aliens in Nigeria", *International Migration Review*, 1988, pp. 4-17); and footnote 6 above, on the case of the collective expulsion of hundreds of Cameroonians from Equatorial Guinea in March 2004.

was engaged in armed conflict with the first State. We must consider whether even in this case it is truly necessary to study the individual situation of each member of such a group if the constituent fact underlying the grounds for expulsion is sufficient to provide a basis for collective expulsion.

25. The case of migrant workers falls within a special regime established by the International Convention on the Protection of the Rights of All Migrant Workers and Their Families adopted by the United Nations General Assembly on 18 December 1990.[35] Article 22 of the Convention sets out in considerable detail the conditions for expelling such persons. It prohibits measures of collective expulsion against migrant workers and members of their families and orders that each case of expulsion should be examined and decided individually. The procedure to be followed in cases of expulsion, which is described in minute detail, reinforces the guarantees that protect the rights of expellees, including sheltering them from mere administrative decisions. It guarantees the expellees' right to receive information, to submit arguments against their expulsion and to be compensated if a decision of expulsion that has already been executed is subsequently annulled.

26. In addition, the expulsion of aliens establishes the right of the State of origin to exercise its jurisdiction with respect to the personal protection of its nationals residing outside its borders. In that case, it is authorized by international law to protect its nationals by providing diplomatic protection through judicial or non-judicial means. Diplomatic protection is a separate subject, and the Commission is currently completing a study of it. The Special Rapporteur therefore intends now only to explore the ways in which this institution might be used by an expellees' State of origin. The *Diallo* case,[36] which Guinea brought before the International Court of Justice in 1998, showed that the institution of diplomatic protection is not as outmoded as some would hold, but remains in some cases the only means whereby a State may effectively protect the interests of one of its nationals who has been expelled from another State.

27. In that connection, the Special Rapporteur believes that it would be worthwhile to examine all the legal consequences of expulsion within the context of the responsibility of the expelling State and the ensuing compensation due for the injury suffered by the persons who were expelled improperly (rules of procedure) or on grounds contrary to the rules of international law (substantive rules). This of course would not involve studying (again) the general rules concerning the responsibility of States for internationally wrongful acts — it is common knowledge that the Commission completed its work on that question in 2001 — but rather determining how to take advantage of those rules to devise a complete regime under international law relating to the expulsion of aliens. It will no doubt became apparent that for many expellees the major concern is not simply the possibility of compensation, but also enjoyment of the right to return to the countries from which they were improperly expelled. This is entirely different from the cases of people who have been expelled with respect for due process and in conformity with international law.

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[35] For a summary of the Convention and the status of ratifications in 1999, see David Weisbrodt, "Working paper on the rights of non-citizens", United Nations document E/CN.4/Sub.2/1999/7 (1999), paras. 47-49.

[36] ICJ, *Ahmadou Sadio Diallo* (*Republic of Guinea v. Democratic Republic of the Congo*), filed on 28 December 1998; pending.

VI. Methodological issues

28. The topic of "the expulsion of aliens" derives from both domestic and international law. In fact, it involves national rules issued by the State in connection with its territorial sovereignty, and rules of international law, either general or specific and treaty-related, concerning the protection of human rights. National practice and the comparative law perspective will play a fundamental role in the identification of rules that the international community could be considered to hold in common and thus to be codifiable as international legal norms. Such national practice would be defined by comparing the available or accessible legislation and legal precedents of most States, as well as of international regional human rights courts. This transnational and comparative approach is all the more appropriate inasmuch as even some national courts take comparative law as the basis for their decisions in cases relating to the expulsion of aliens. Thus, in the *Habeas Corpus d'Alfredo Rossi* case, for example, the Federal District Court of Rio de Janeiro invoked the laws of several European countries to substantiate the existence of the right to expel an alien on grounds of public and political order: "Considering that the right to expel an alien, by reason of public and political order, has been exercised, and still is, by all Governments; and is expressly found in French, Swiss, Danish, Spanish, Dutch and English legislation".[37]

29. In this connection, the case law of the European Commission of Human Rights, the European Court of Human Rights, the Inter-American Court of Human Rights and the African Commission on Human and Peoples' Rights offers an abundance of rich material that can be mined to extract some hard and fast rules on the subject.

30. There is one question, in particular, on which the Special Rapporteur would like to have the opinion of the members of the Commission, namely how to deal with existing treaty rules on the issue. Should they be taken up again in the draft articles to be drawn up in the future or should those articles be limited to bridging any legal gaps? Should the draft articles be restricted to the formulation of basic principles relative to the expulsion of aliens or, on the contrary, propose an entire legal regime? The Special Rapporteur is inclined to believe that draft articles on this topic would be of interest only if they presented as exhaustive a legal regime as possible, founded on general principles forming the legal basis for the expulsion of aliens under international law. This inclination has led him to propose the draft workplan attached to this preliminary report.

[37] *Revista de Direito*, 536-541, quoted by J. Irizarry y Puente, op. cit., p. 258.

Annex I

Draft workplan

Part 1: General rules

I. Scope

A. Expulsion and related concepts

1. Expulsion and exile
2. Expulsion and population displacement
3. Expulsion and population exodus
4. Expulsion and deportation
5. Expulsion and extradition
6. Expulsion and refoulement at the border
7. Expulsion and non-admission
8. Expulsion and "extrajudicial transfer"
9. Expulsion and "extraordinary transfer"
10. Expulsion and inadmissibility
11. Expulsion and escort to the border

B. Definitions

1. Alien
2. Expulsion
3. Expulsion of aliens

II. General Principles

A. A right inherent in State sovereignty

1. A customary rule
2. A rule which is not absolute

B. A right to be exercised subject to respect for the fundamental rules of international law

1. Principle of non-expulsion of nationals and stateless persons
2. Principle of respect for fundamental human rights during expulsion proceedings
3. Principle of prohibition of collective expulsion

C. Grounds for and lawfulness of expulsion

1. Traditional grounds recognized under international law

(a) Public order

(b) State security

(c) Higher interests of the State?

2. Contingent grounds debatable under international law

(a) Religious belief

(b) Origin

(c) Sexual behaviour

(d) Physical and mental condition

(e) Other

Part 2: Expulsion regimes

I. Individual expulsion

A. Procedure

B. Lawfulness

II. Collective expulsion

A. Principle of prohibition

B. Limits of the principle

III. Specific case of migrant workers

A. Principle of prohibition of collective expulsion

B. Conditions for expulsion

Part 3: Legal consequences of expulsion

I. Rights of expelled persons

A. Right to respect for fundamental rights to dignity

B. Right to return to the territory of the expelling State

C. Right to compensation for any harm suffered

II. Rights of the State of origin: diplomatic protection

A. Diplomatic protection through non-judicial means

B. Diplomatic protection through judicial means

III. Responsibility of the expelling State

A. The principle

B. The implications

Annexe II

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Preliminary report on the expulsion of aliens

By Mr. Maurice Kamto, Special Rapporteur

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I. Introduction

1. The history of mankind has been characterized by mistrust of strangers and the temptation to withdraw from contact with them. There is no need to present a complete picture of this phenomenon, which affects all regions of the world. For example, the Greek city States sought to isolate themselves in an autarkic unit, believing that there was nothing beyond their walls but small tribes of savage barbarians.[1] In Sparta, aliens were banned from the city and accused of disrupting the public order established by law, *eunomia*; already, even in these ancient times, public order was invoked as a justification. From Sparta to Rome, the same attitude prevailed. Aliens were treated as enemies, as seen in the Latin adage: *hostis*, *hospes* (stranger, enemy).[2] Beyond the fortifications marking the boundaries of first the city and then the Empire — such as Hadrian's wall, dividing England from Scotland, the impressive ruins of which still exist — was the world of aliens denied the status of Romans, where only a banished Roman citizen would venture.

2. Today, the status of aliens is very different from what it was under Roman law; most modern, liberal legislation grants them full civil equality with nationals. During the first half of the twentieth century, there was a wave of openness to aliens in Latin America, to the point that then-Attorney-General Montt of Chile declared that, throughout Latin America, aliens had every advantage except access to high-level posts in Congress.[3] Until recently, a similar policy was in force in some African countries. During the first two decades following their independence in the 1960s, it was not unusual for citizens of one African country to occupy high-level posts in the governments of other African States while retaining their nationalities of origin or for large groups of Africans from one country to settle and live peacefully in another African country without following the entry or sojourn procedures or acquiring the nationality of the host State. Such openness also existed among the old European nations, where it has gradually become more widespread as a result of the creation of the European Community.

3. Despite this liberal trend in contemporary legislation, however, the expulsion of aliens remains a common practice on every continent. On the grounds that the right to expel is an inalienable right of the State, States do not hesitate to use it as a shield against aliens whom they view either as a threat to national security or as a potential threat to public order in the host country. For example, this right has been widely invoked against the Chinese, who were the most commonly expelled, in the late nineteenth century, especially in America; at that time China had no place in the family of so-called "civilized" nations and thus could not appeal to the international community, especially as China itself repeatedly invoked the right to expel aliens.[4] Moreover, the expulsion of aliens in time of war seemed perfectly normal at a time when war between States, even in cases not involving self-defence, was not

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[1] See Jean Touchard et al., *Histoire des idées politiques* (Paris, Presses Universitaires de France (Thémis), 1959), vol. 1: "Des origines au XVIIIe siècle", pp. 9 and 10.

[2] See Baroness Elles (Special Rapporteur of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities), *Study of International Provisions Protecting the Human Rights of Non-Citizens* (United Nations Publication, Sales No. E.80.XIV.2).

[3] See J. Irizarry y Puente, "Exclusion and expulsion of aliens in Latin America", *The American Journal of International Law* 36 (1942), pp. 252 and 253.

[4] See A. H. Marsh, "Colonial expulsion of aliens", *American Law Review* 33 (1899), pp. 90 and 91.

prohibited by international law and when a declaration of war was automatically considered to make the people of the belligerent States each other's enemies. One late-nineteenth-century author wrote: "Nothing could be clearer than the right of the British executive in time of war to exclude the subjects of the unfriendly power."[5]

4. The spread of freedom and democracy and the development of humanitarian and human rights law have shown that a government can go to war even against the will of the majority of its people and have led jurists, States and public opinion to distinguish between combatants and non-combatants and between the acts of States and those of individuals. Nevertheless, the expulsion of aliens has become far more common in peacetime than in time of war. Thus, it is no longer a case of aliens from an enemy country versus aliens from a friendly country, nor are the friendly relations between two States necessarily at stake when aliens are expelled; the cause is more likely to be the expelling State's desire to solve a domestic problem. Whether aliens are used as scapegoats[6] or are the victims of their own misdeeds, the desire to preserve public order is the primary motive for their expulsion.[7] The frequent discrepancies between State practice and international law do pose problems in this area.[8]

5. The topic of the expulsion of aliens is of particular interest today insofar as it reveals the contradiction between technical and economic globalization, which promotes greater trade flows between nations, and the raising of barriers based on sovereignty which hinder or block the movement of persons by creating selection procedures for distinguishing between those who have the right to enter and reside in the territory of a State or group of States, and those who lack that right. With the development and rapidity of modern means of transport, migratory flows from one country to another and from one part of the world to another have literally exploded, intensified by development inequalities between nations which lead more and more marginalized people from poor countries to seek entry into rich countries in the hope of a better future.[9] But, paradoxically, national borders are becoming less permeable and the manner in which aliens are received varies according to all manner of considerations, including the applicants' economic potential, their scientific expertise and even their religious beliefs. The unprecedented scope of international terrorism and the ongoing threat that it represents only make matters worse; they have aggravated national tensions that had long been based primarily on social and economic egotism and xenophobia. The key problem in this area is how

[5] Ibid., p. 91.

[6] In 2004, for example, several hundred Cameroonians were expelled from Equatorial Guinea because the regime in power in that country was at risk of destabilization by foreign mercenaries (see the *Cameroon Tribune*, 15 March 2004).

[7] One of the most recent cases is the expulsion on 19 March 2005 of three clergymen of the Universal Church of the Kingdom of God, a religious group founded in Brazil, because the group was burning copies of the Bible in public (source: Radio France Internationale, 19 March 2005).

[8] See Charles de Boeck, "L'expulsion et les difficultés internationales qu'en soulève la pratique", Recueil des Cours de l'Académie de la Haye, vol. 18 (1927-111) (Paris, 1928), pp. 443-650.

[9] To offer an example, the aforementioned study of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities noted, more than 20 years ago, that over 10 million people had emigrated from Europe and another 10 million had immigrated to the European Community since 1945; over 7 million people had been transferred from India to Pakistan since 1947; and about 5 million migrants were working in Africa each year (op cit., p. 1, para. 15).

to reconcile the right to expel, which seems inherent in State sovereignty, with the demands of international law and, in particular, the fundamental rules of human rights law.

6. This preliminary report seeks to provide an overview of the topic by demonstrating the legal issues that it raises and the problems associated with their consideration. The Special Rapporteur was of the view that the advantage, and the very essence, of a preliminary report are to present the topic to be studied in order to explain how he proposes to proceed and to seek guidance from the Commission in that regard. A preliminary report formulates issues and suggests approaches rather than offering final solutions embodied in positive law or, where applicable, suggested by the progressive development of international law. It is in this spirit that the Special Rapporteur proposes, in this report, first to set forth the issues raised by the very idea of the "expulsion of aliens" (sect. II); then to provide an overview of the right to expel in international law (sect. III), the grounds for expulsion invoked in practice (sect. IV) and the rights at stake during expulsion (sect. V); and, lastly, to examine the methodological problems associated with consideration of the topic (sect. VI). The manner in which the Special Rapporteur proposes to conduct the study of this topic will then be described through a workplan which is placed before the Commission for discussion, provided in annex I to the preliminary report; annex II contains a bibliography which in no way claims to be exhaustive; its purpose is simply to offer a source of supplementary information which may help to enrich the Special Rapporteur's future work.

II. The concept of the expulsion of aliens

7. The topic, "the expulsion of aliens", is based on two ideas: that of "expulsion" and that of "alien", which must be defined before an attempt is made to identify the rules of international law relating thereto. Because the concept of expulsion can be understood only in relation to that of alien, the latter will be discussed first. "Alien" means an individual who does not hold the nationality of the host country or the country of residence but who is bound by a link of nationality to the State from which he or she comes — the State of origin — or who holds no nationality at all and is thus in a situation of statelessness.[10]

8. Viewed as a fact, expulsion may be understood simply as a forced border crossing or exit from the territory of a State by an individual who is compelled to do so. But this description does not provide an adequate legal determination of the concept of expulsion; its legal definition requires particularly close study because it seems to be interwoven with other similar concepts from which it cannot easily be separated. It appeared to the Special Rapporteur that a definition of the concept of expulsion under international law could be proposed only after comparing it with other concepts such as the displacement of populations, exodus, deportation, extradition, refoulement, non-admission, exclusion from a territory, "extrajudicial transfer", "extraordinary transfer", removal from a territory and escort to the border.

[10] See, inter alia, Bruno Nascimbene and Alessia di Pascale, "Rapport de synthèse et conclusions", in *L'éloignement et la détention des étrangers dans les Etats membres de l'Union européenne*, ed. B. Nascimbene (Milan, Giuffrè, 2001), p. 533 and Pierre Marie Dupuy, *Droit international public*, 7th ed. (Paris, Dalloz, 2004), p. 129.

9. Most of these concepts share common traits with that of expulsion, but they differ from it in several ways. For example, the same legal concept cannot be applied to both the *MV Tampa* case, which involved a ship flying the Norwegian flag which the Australian and Indonesian Governments would not allow to dock because they did not want to accept the hundreds of Afghan and Iraqi asylum-seekers on board,[11] and the March 2004 expulsion of hundreds of Africans of various nationalities from an African country of which some of them were longtime residents.[12]

10. We can easily agree that persons displaced within their own country do not fall within the scope of this topic. Non-admission or refusal of admission — a situation in which a person who has not yet entered a State's territory is prevented from doing so — lies on the margins of the topic: it will have to be decided whether it should be included or not. It will also have to be determined whether a person who enters a State's territory clandestinely and is "removed" from it should be deemed to have been expelled or refused entry and whether the topic should include cases of expulsion by a victorious Government in the context of a conflict between two peoples, each seeking exclusive control of the same territory — for example, the hundreds of thousands of Palestinians who were forced to leave or were expelled from their homes and land when the State of Israel was established in 1948, and again following the occupation of a portion of their territory after the Six Day War in 1967.

11. In this preliminary report, the Special Rapporteur does not intend to embark on a semantic comparison of each of the aforementioned concepts with the central concept of expulsion or to propose responses to the various concerns expressed above. One of the objectives of the first report will be to clarify these concepts, taking the Commission's guidance into account in determining the scope of the concept of the expulsion of aliens for the purpose of developing a set of draft articles. In this report, it will suffice to mention the plethora of terms used in this field, both in legal theory[13] and in the legislation of certain countries,[14] and to propose an entirely provisional definition of the concept of expulsion with a view to delimiting the scope of the preliminary consideration and discussion of the topic.

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[11] On the *MV Tampa* case, see Amnesty International's annual report on the Pacific region of 25 August 2002, entitled Australia-Pacific: Offending human dignity — the "Pacific Solution" (http://web.amnesty.org/library/index/engasa120092002).

[12] See the expulsions from Equatorial Guinea mentioned above.

[13] For example, scholars speak of removal from a territory (see Rudolph d'Haëm, *La reconduite à la frontière des étrangers en situation irrégulière* (Paris, Presses Universitaires de France (Que sais-je), 1997), p. 3) and of deportation (see "Governing Rule 12: Expulsion or Deportation of Aliens"), in *Studies in Transnational Legal Policy* 23, 1992, pp. 12 et seq.

[14] See, for example, the French Act of 9 September 1986 on conditions governing the entry and stay of aliens in France, in which the terms "expulsion", "escort to the border" and "inadmissibility" are used (Act No. 86-1025 of 9 September 1986, *Juriclasseur Périodique* (J.C.P.), 1986 III, 59212, and *Journal Officiel de la République française* (J.O.R.F.), 12 September 1986).

12. Following the reasoning of domestic law, "expulsion" can refer to an administrative policy measure enjoining an alien to leave a territory.[15] Under French law, for example, the term "expulsion" is used in reference to aliens whose presence in French territory, even if legal, constitutes a "serious threat to public order".[16] This strict definition of the concept excludes several other measures for the removal of aliens which, in the Special Rapporteur's view, should fall within the scope of the concept within the framework of this topic. The term "removal" seems, at first glance, preferable because it is more comprehensive, but although it is used by some theorists,[17] it has the disadvantage of not being a consecrated legal term.

13. The Special Rapporteur believes that for the purposes of this topic, the term "expulsion" should be retained but should be interpreted broadly so as to include all measures for removing aliens from the territory of the expelling State. From the point of view of international law, it should be explained that such a measure must be a unilateral legal act — that of a State — and that it is a compulsory measure targeting an individual or group of individuals. Thus, "expulsion" might be provisionally defined as a legal act in which a State compels an individual or group of individuals who are nationals of another State to leave its territory. The study will show whether the expelled person's physical crossing of the expelling State's border corresponds to the concept of expulsion, or whether it is a consequence thereof, and whether a distinction should be made between the legal act of expulsion and the expelled person's physical act of crossing the border or leaving the territory of the State in question.

III. The right to expel

14. The monitoring by a State of its borders is intended not only to warn it of any invasion by foreign armed forces, but also to protect it from infiltration by aliens seeking peacefully to enter the territory to take advantage of living standards within it.[18] International law therefore recognizes the discretionary power of each State to grant or refuse entry to its territory. Equally, international law recognizes the right of the State itself to set the conditions for the entry and residence of aliens in its territory.[19] In the words of a late nineteenth century author "Every country has a right to judge of the terms upon which it will admit foreigners within its borders ... The exercise of that right is one of which no nation has any right to complain".[20]

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[15] *Dictionnaire de droit international public*, ed. Jean Salmon (Brussels, Bruylant, 2001), p. 488.

[16] See the report of François Julien-Laferrière and Sophie de Sèze in Nascimbene (ed.), op. cit., pp. 183 et seq.

[17] Ibid.; see also the title of the book.

[18] See Roman Rewald, "Judicial control of administrative discretion in the expulsion and extradition of aliens", *American Journal of Comparative Law* (*Supp.*, 1986), p. 41.

[19] See V. J. Irizarry y Puente, "Exclusion and expulsion of aliens in Latin America", op. cit., p. 254.

[20] A. H. Marsh, "Colonial expulsion of aliens", op. cit., p. 90.

15. Logically, the obverse of the right to regulate the admission or non-admission of aliens is the right to expel them. Every State fully enjoys that right, which is inherent in its sovereignty. It is a principle of customary international law, which is rarely contested.[21] As Shigeru Oda once said:

> "The right of a State to expel, at will, aliens, whose presence is regarded as undesirable, is, like the right to refuse admission of aliens, considered as an attribute of the sovereignty of the State".[22]

16. National laws, international jurisprudence and doctrine are in agreement that this right is not an absolute right of the State.[23] The State resorting to expulsion is bound to invoke the grounds used to justify it.[24] Although every State in fact has the right freely to determine the grounds for expelling an alien according to its own criteria, "the right of expulsion still must not be abused".[25] The State's right to expel aliens therefore falls within the realm of international law.

IV. Grounds for expulsion

17. There are always grounds for the expulsion of an alien by a State, whether they are avowed or unavowed. It is agreed that some grounds for expulsion are not contrary to international law. This is generally the case with breaches of "law and order", "public safety" or "national security". In fact, any notion as vague as that of law and order sometimes gives rise to many different, often very broad, interpretations including acts that could not be considered the basis for lawful expulsion.

18. Grounds for expulsion may vary from one country to another. In the United States of America, for example (the Immigration and Nationality Act), in force in 1965 excluded from entry into American territory aliens having a psychopathic personality or suffering from epilepsy or mental retardation. In two famous cases relating to this Act, *Boutilier* v. *INS*[26] and *In re Longstaff*,[27] the Supreme Court decided to refuse admission to and, furthermore, to order the expulsion of, homosexual aliens on the ground of sexual deviation.

19. A study of a variety of national laws shows an even wider range of grounds for expulsion. For example, expulsion may be motivated by the fact that, among other things, the alien is a threat or a danger to public peace; jeopardizes relations between the country concerned and other States; seeks to foment change in the political order through violent means; espouses doctrines that are either subversive

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[21] In this connection, it is worth noting the marginal opinion of M. Tchernoff, "Protection des nationaux resident à l'étranger", *Revue de droit internationale*, vol. XX, p. 45, which states: "Few persons nowadays maintain that the right to expel aliens is a normal attribute of a State exercising its civilizing function".

[22] In M. Sørensen (ed.), *Manual of Public International Law*, 1968, p. 482.

[23] See V. Bluntschli, *Droit internationale codifié*, article 383; *Oppenheim's International Law*, 9th edition, vol. 1, p. 940.

[24] *Boffolo* case, *R.S.A.*, vol. X, p. 533; see also *Paquet*, ibid., vol. IX.

[25] S. Oda, op. cit., p. 482.

[26] 387 U.S. 118 (1967) and the critical note "The Immigration and Nationality Act and the exclusion of homosexuals: Boutilier vs. INS Revisited", *Cardozo Law Review*, 1981, p. 359 et seq.

[27] 716 F 2d 1439 (5th Cir. 1983).

or contrary to the established order; is unemployed, without a fixed abode or without a livelihood; is a criminal or is being prosecuted; or is suffering from an infectious or serious illness, is mentally deficient, a beggar, a prostitute, an adventurer or an illicit trafficker. Such grounds are found in the law of Latin American countries for the period between 1907 and 1925.[28] There is also the expulsion of Roma from several European and Latin American countries; the expulsion of aliens from some countries because of their ideological convictions, in particular during the cold war;[29] or the expulsion of various persons, such as homosexuals, because of their sexual behaviour.[30]

20. The international context has evolved and, with it, so have the rules of international law. To a large extent, the rules relating to the protection of fundamental human rights no longer fall within the purview of States and this affects the law applicable to the expulsion of aliens. The question to be answered therefore is which of the many grounds for expelling aliens are admissible under international law, or *a contrario*, which are prohibited. Yet how can this question be answered effectively, when what is admissible or tolerated in one State or region of the world may not necessarily be so elsewhere? The lawful or unlawful nature of grounds for expulsion follows the evolution of international legal standards concerning the protection of human rights. We must therefore be able to determine the relevant universal standards.

V. Rights related to expulsion

21. The exercise of the right to expel brings into play the rights of the aliens being expelled and those of their State of origin. The rights of expellees vary according to whether a case concerns the expulsion of an individual, collective expulsion or the expulsion of migrant workers.

22. Expulsion of an individual, which is the most commonly practised form, usually involves the rights of an individual. Those rights may derive either from the expelling State's national legislation or from international human rights law. In that regard, the lawfulness of the expulsion depends on two factors: conformity with the expulsion procedures in force in the expelling State and respect for fundamental human rights.

23. With regard to the expulsion procedure, a logical rule holds that if a State has the right to regulate the conditions for immigration into its territory without thereby infringing any rule of international law, it also is obliged to act in conformity with

[28] Such grounds arise in the law of Brazil (1907), Panama (1914), Chile (1919), Columbia (1920) and the Bolivarian Republic of Venezuela (1925); see Irizarry y Puente, op. cit., p. 256, notes 22-34.

[29] This refers, in particular, to the expulsion of communists from the United States of America during the McCarthy era.

[30] See Samuel M. Silvers, "The exclusion and expulsion of homosexual aliens", *Columbia Human Rights Law Review*, 1983-1984, p. 295 et seq.

the rules which it has adopted or to which it has agreed[31] concerning the expulsion of persons whom it deems that it cannot receive or retain in its territory. In such cases, the State is bound by one of the following adages: *pacta sunt servanda and tu patere legem quam ipse fecisti*, or both. This requirement concerning respect for procedures provided for by law may therefore be considered an obligation under general international law and not strictly a treaty obligation or an obligation under domestic law alone. In the absence of a treaty, it might be reasonable to claim that the requirement has a basis in customary law, or to consider it a general legal principle. With regard to personal rights to be respected in cases of expulsion, international law is applicable through both customary and treaty law. The obligations of the territorial State under customary international law apply to all aliens regardless of nationality. They are grouped around the rather imprecise notion of a "minimum standard", which is based on the idea that nowadays international law affords aliens a minimum of guarantees, even though it is difficult to specify what they are.[32] What is known is that the requirement concerning respect for the dignity of the alien being expelled is one of the standards guaranteed by international law with regard to natural persons. The assets held by the expelled alien in the territory of the expelling State, are protected by the relevant rules of international law. However, protection of the alien who has been or is being expelled, as well as his assets, may be enhanced by treaty norms: those contained in international human rights agreements to which the expelling State is a party and those provided for by special agreements relating to the protection of assets and investments drawn up between the expelling State and the alien's State of origin where such special agreements exist.

24. With regard to collective expulsion, the principle deriving from international law prohibits it,[33] although it is still practised by some States.[34] The question is whether this prohibition is absolute. Despite the brevity of the provisions addressing it, the matter is open to doubt. It might be difficult, for example, to raise this principle to object where a group of nationals of one State jeopardized the safety of, or posed a genuine threat to, a second State in which they were residing and which

[31] See article 13 of the International Covenant on Civil and Political Rights, adopted by the United Nations General Assembly on 16 December 1966 (resolution 2200 A (XXI); see also article 31 of the Convention relating to the Status of Stateless Persons, of 1954; article 22 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families of 1990; and at the regional level: article 22 (6) of the American Convention on Human Rights, of 1969; the African Charter of Human and People's Rights, of 1981; and article 1 of Protocol No. 7, of 1984, to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

[32] See P. M. Dupuy, op. cit., p. 131.

[33] See article 4 of Protocol No. 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (freedom of movement and of choice of residence; prohibition of exile, of collective expulsion of aliens and of imprisonment for a civil debt) which was signed in Strasbourg, France, on 16 September 1963 and entered into force on 2 May 1968 (text published in *International Legal Materials*, 1967, p. 27).

[34] See, for example, the collective expulsion of the Indo-Pakistanis from Uganda under Idi Amin during the 1970s (on this topic, see Michael Twaddle (ed.), *Expulsion of a minority: essays on Ugandan Asians* (London, Athlone Press, 1975), p. 240); the expulsion of groups of Africans of different nationalities (in particular Beninese and Ghanaians) from Nigeria in the 1980s (see A. A. Afolayan, "Immigration and expulsion of ECOWAS aliens in Nigeria", *International Migration Review*, 1988, pp. 4-17); and footnote 6 above, on the case of the collective expulsion of hundreds of Cameroonians from Equatorial Guinea in March 2004.

was engaged in armed conflict with the first State. We must consider whether even in this case it is truly necessary to study the individual situation of each member of such a group if the constituent fact underlying the grounds for expulsion is sufficient to provide a basis for collective expulsion.

25. The case of migrant workers falls within a special regime established by the International Convention on the Protection of the Rights of All Migrant Workers and Their Families adopted by the United Nations General Assembly on 18 December 1990.[35] Article 22 of the Convention sets out in considerable detail the conditions for expelling such persons. It prohibits measures of collective expulsion against migrant workers and members of their families and orders that each case of expulsion should be examined and decided individually. The procedure to be followed in cases of expulsion, which is described in minute detail, reinforces the guarantees that protect the rights of expellees, including sheltering them from mere administrative decisions. It guarantees the expellees' right to receive information, to submit arguments against their expulsion and to be compensated if a decision of expulsion that has already been executed is subsequently annulled.

26. In addition, the expulsion of aliens establishes the right of the State of origin to exercise its jurisdiction with respect to the personal protection of its nationals residing outside its borders. In that case, it is authorized by international law to protect its nationals by providing diplomatic protection through judicial or non-judicial means. Diplomatic protection is a separate subject, and the Commission is currently completing a study of it. The Special Rapporteur therefore intends now only to explore the ways in which this institution might be used by an expellees' State of origin. The *Diallo* case,[36] which Guinea brought before the International Court of Justice in 1998, showed that the institution of diplomatic protection is not as outmoded as some would hold, but remains in some cases the only means whereby a State may effectively protect the interests of one of its nationals who has been expelled from another State.

27. In that connection, the Special Rapporteur believes that it would be worthwhile to examine all the legal consequences of expulsion within the context of the responsibility of the expelling State and the ensuing compensation due for the injury suffered by the persons who were expelled improperly (rules of procedure) or on grounds contrary to the rules of international law (substantive rules). This of course would not involve studying (again) the general rules concerning the responsibility of States for internationally wrongful acts — it is common knowledge that the Commission completed its work on that question in 2001 — but rather determining how to take advantage of those rules to devise a complete regime under international law relating to the expulsion of aliens. It will no doubt became apparent that for many expellees the major concern is not simply the possibility of compensation, but also enjoyment of the right to return to the countries from which they were improperly expelled. This is entirely different from the cases of people who have been expelled with respect for due process and in conformity with international law.

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[35] For a summary of the Convention and the status of ratifications in 1999, see David Weisbrodt, "Working paper on the rights of non-citizens", United Nations document E/CN.4/Sub.2/1999/7 (1999), paras. 47-49.

[36] ICJ, *Ahmadou Sadio Diallo* (*Republic of Guinea v. Democratic Republic of the Congo*), filed on 28 December 1998; pending.

VI. Methodological issues

28. The topic of "the expulsion of aliens" derives from both domestic and international law. In fact, it involves national rules issued by the State in connection with its territorial sovereignty, and rules of international law, either general or specific and treaty-related, concerning the protection of human rights. National practice and the comparative law perspective will play a fundamental role in the identification of rules that the international community could be considered to hold in common and thus to be codifiable as international legal norms. Such national practice would be defined by comparing the available or accessible legislation and legal precedents of most States, as well as of international regional human rights courts. This transnational and comparative approach is all the more appropriate inasmuch as even some national courts take comparative law as the basis for their decisions in cases relating to the expulsion of aliens. Thus, in the *Habeas Corpus d'Alfredo Rossi* case, for example, the Federal District Court of Rio de Janeiro invoked the laws of several European countries to substantiate the existence of the right to expel an alien on grounds of public and political order: "Considering that the right to expel an alien, by reason of public and political order, has been exercised, and still is, by all Governments; and is expressly found in French, Swiss, Danish, Spanish, Dutch and English legislation".[37]

29. In this connection, the case law of the European Commission of Human Rights, the European Court of Human Rights, the Inter-American Court of Human Rights and the African Commission on Human and Peoples' Rights offers an abundance of rich material that can be mined to extract some hard and fast rules on the subject.

30. There is one question, in particular, on which the Special Rapporteur would like to have the opinion of the members of the Commission, namely how to deal with existing treaty rules on the issue. Should they be taken up again in the draft articles to be drawn up in the future or should those articles be limited to bridging any legal gaps? Should the draft articles be restricted to the formulation of basic principles relative to the expulsion of aliens or, on the contrary, propose an entire legal regime? The Special Rapporteur is inclined to believe that draft articles on this topic would be of interest only if they presented as exhaustive a legal regime as possible, founded on general principles forming the legal basis for the expulsion of aliens under international law. This inclination has led him to propose the draft workplan attached to this preliminary report.

[37] *Revista de Direito*, 536-541, quoted by J. Irizarry y Puente, op. cit., p. 258.

Annex I

Draft workplan

Part 1: General rules

I. Scope

A. Expulsion and related concepts

1. Expulsion and exile
2. Expulsion and population displacement
3. Expulsion and population exodus
4. Expulsion and deportation
5. Expulsion and extradition
6. Expulsion and refoulement at the border
7. Expulsion and non-admission
8. Expulsion and "extrajudicial transfer"
9. Expulsion and "extraordinary transfer"
10. Expulsion and inadmissibility
11. Expulsion and escort to the border

B. Definitions

1. Alien
2. Expulsion
3. Expulsion of aliens

II. General Principles

A. A right inherent in State sovereignty

1. A customary rule
2. A rule which is not absolute

B. A right to be exercised subject to respect for the fundamental rules of international law

1. Principle of non-expulsion of nationals and stateless persons
2. Principle of respect for fundamental human rights during expulsion proceedings
3. Principle of prohibition of collective expulsion

C. Grounds for and lawfulness of expulsion

1. Traditional grounds recognized under international law

(a) Public order

(b) State security

(c) Higher interests of the State?

2. Contingent grounds debatable under international law

(a) Religious belief

(b) Origin

(c) Sexual behaviour

(d) Physical and mental condition

(e) Other

Part 2: Expulsion regimes

I. Individual expulsion

A. Procedure

B. Lawfulness

II. Collective expulsion

A. Principle of prohibition

B. Limits of the principle

III. Specific case of migrant workers

A. Principle of prohibition of collective expulsion

B. Conditions for expulsion

Part 3: Legal consequences of expulsion

I. Rights of expelled persons

A. Right to respect for fundamental rights to dignity

B. Right to return to the territory of the expelling State

C. Right to compensation for any harm suffered

II. Rights of the State of origin: diplomatic protection

A. Diplomatic protection through non-judicial means

B. Diplomatic protection through judicial means

III. Responsibility of the expelling State

A. The principle

B. The implications

Annex II

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